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Supreme Court, U.S.
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No. _____

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1988

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JOHN T. HARDING,

Petitioner,

v.

COUNTY OF DOOR,

Respondent

****

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

****

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102 pgs

Questions Presented

I. Whether the substantive component of the Fourteenth Amendment's Due Process clause precludes an arbitrary and capricious or trivial revocation of a building permit where the Plaintiff's housing project is under construction, the revocation is declared illegal and premised upon personal and political animus, and there is no compelling governmental interest to halt construction?

II. What standard of proof is employed to determine whether a political revocation of a building permit and rezoning violates substantive due process?

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No. A-1009

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JOHN T. HARDING,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

****

Petitioner John T. Harding respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals For The Seventh Circuit entered in the above entitled proceeding on March 20, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 870 F.2d and is reprinted in the Appendix hereto, at page 1a, infra.

The opinion of the United States District Court for the Eastern District of Wisconsin is reprinted in the Appendix hereto, at page 9a, infra.

JURISDICTION

The judgement and opinion of the Court of Appeals for the Seventh Circuit was issued on March 20, 1989. By order dated June 20, 1989, Justice John Paul Stevens extended Petitioner's time for filing this Petition for a Writ of Certiorari to and including July 30, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1245 (1).

CONSTITUTIONAL PROVISIONS

AND STATUTES INVOLVED

U.S. Const. amend. XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner filed this action on October 21, 1986 against the County of Door, Wisconsin seeking damages, and injunctive and declaratory relief arising out of Respondent's revocation of Harding's building permit and the rezoning of his property which halted construction of his housing project. On July 1, 1988, the Honorable Joseph P. Stadtmueller, U.S. District Judge, issued a decision and order denying Harding's motion for summary judgment and granting Door County's motion for summary judgment. Harding appealed and the United States Court of Appeals for the Seventh Circuit affirmed. 870 F.2d 430.

B. FACTS

Petitioner Harding owns a tract of land in Door County, Wisconsin, which consists of approximately 35 acres. This land is zoned single-family residential (R-1). Harding, a builder and a real estate agent, decided in 1983 to develop this parcel of land by constructing 14 single-family homes thereon, each of which would be sold as a condominium on a timeshare basis. The fee purchaser of a timeshare segment would be entitled to use his or her respective home for four weeks during the year, one week in each season.

Prior to seeking the zoning permits from Door County, Harding retained a surveyor to prepare a condominium plat which provided for 14 contemplated buildings to be clustered on the property.

Harding also had soil borings performed on each site so that a preliminary determination could be made as to the feasibility of installing a septic system. This information was then presented to the Door County Planning Department which had the initial responsibility for issuing zoning permits. At the same time, Harding submitted an application for a building permit for site three, the first home to be constructed. The Planning Department was informed of Harding's intention to sell the units in fee, on a timeshare basis.

Before approving Harding's plan of development, the Planning Department informed him that each home would have to be located on its own 2-1/2 acre parcel to meet the R-1 zoning requirements. Harding had the property resurveyed and filed a new condominium plat which

provided for the required site acreage. The overall plan was approved by the Planning Department as submitted.

Harding's zoning permit was properly issued in November, 1983 by the Planning Department. Prior to issuance of the permit, the zoning administrator found that Harding had met all the requirements of the county's zoning ordinances. Harding presold seven of the 13 timeshare segments for unit three and also obtained a one-year construction loan in the amount of $100,000.

After the permit was issued, local residents became politically and personally concerned and mounted a campaign of political pressure seeking to halt construction of Harding's project. One of the adjoining landowners filed a petition with the Door County Board of

Adjustment (hereinafter Board), appealing the Planning Department's issuance of the zoning permit to Harding. On January 3, 1984 the Board held a public hearing on the petition, which was attended by approximately a dozen of Harding's neighbors. Several of these people had counsel appear with them. All of these individuals opposed Harding's plan, giving as reasons for their opposition emotional and personal concerns, such as congestion, the tranquility of the present neighborhood, and unfounded environmental problems.

The only professional at the hearing to discuss the County's zoning ordinances and the legality of a possible revocation was the County's own zoning administrator, David Sautebin. Sautebin informed the Board that Harding had met all of the requirements for issuance of a

permit and that it was illegal in Wisconsin to discriminate based upon a method or type of ownership. However, the Board subsequently caved in to this political and personal uproar and revoked Harding's building permit on February 7, 1984. At that juncture, unit three was only partially constructed.

The Board revoked the permit even though individual Board members knew at the time, as they later testified during depositions, that Harding had met all of the requirements for the issuance of a permit, such as lot size, set backs, sanitation requirements, etc. The Board based their decision on Harding's ownership scheme, a factor which was not then restricted or regulated in the County's zoning ordinances.

Harding then appealed the Board's decision to the Door County Circuit Court

pursuant to Wis. Stat. Sec. 59.99(10). The circuit court affirmed the Board's decision by a decision dated July 30, 1984. By letter dated August 4, 1984, the Planning Department reissued Harding's permit for unit three, with the condition that once constructed it could not be sold on a timeshare basis, whether in fee or otherwise. Harding appealed the circuit court decision to the State of Wisconsin Court of Appeals which reversed the trial court. State ex rel John T. Harding v. Door County Board of Adjustment and Leslie E. Cowen, 125 Wis. 2d 269, 371 N.W. 2d 403 (Ct. App. 1985). This decision was issued on June 11, 1985. The County then petitioned the Wisconsin Supreme Court to hear its appeal, which petition was denied on September 10, 1985; approximately 22

months after Harding's permit was first issued.

What occurred next is a matter of some dispute. Harding contends that in either October or November 1985, he had a discussion with Robert Florence, the head of the Planning Department, in which Harding asked Florence if he was now ready to issue the additional 13 permits. Florence responded that if applications were filed they would first have to be reviewed by the Board before the Planning Department could act on them. This review would have been contrary to the established procedure used by the county in granting permits, and consequently, arbitrary, capricious and for political and personal reasons. Florence denies that the conversation took place or alternatively states that he cannot remember such a conversation taking

place. In any event, Harding, acting in reliance upon the conversation with Florence, did not file applications for the additional permits. Instead, he retained counsel who filed a notice of claim against the county in November 1985. The claim was denied on April 10, 1986 and Harding commenced suit for compensatory damages against Door County in state circuit court. The state court action was dismissed by stipulation of the parties sometime after October 21, 1986, the date the instant action was filed.

By Ordinance No. 23-86, which became effective May 4, 1986, the Door County Board of Supervisors amended the Door County Zoning Ordinances. The intent and effect of this zoning amendment was to prohibit Harding's development on his property zoned R-1.

Under the amended ordinance, the zoning restrictions applicable to timesharing condominium projects depended, among other things, upon the period of time the dwelling unit would be occupied by each occupant. When the occupancy interval is 30 days or less (as originally planned by Harding) the zoning restrictions governing Recreational, Shoreland Community, Rural Community or Resort Commercial zoning districts may apply. If the occupancy interval is more than 30 days, the restrictions governing single-family residential districts may apply, regardless of how title is held.

The revocation of the permit and the resulting 22-month delay before the Wisconsin Supreme Court denied the County's petition for review caused Harding substantial economic harm, making it personally impossible for him

to continue with the project. Because Door County's illegal obstructive tactics precluded him from proceeding with his development, he also sustained damages of lost profits. The crux of this case involves the illegal, arbitrary and capricious revocation of Harding's building permit for improper personal and political reasons.

C. DISTRICT COURT OPINION BELOW

The District Court framed the issues as follows:

1) Whether revocation of Harding's zoning [building] permit by the Board deprived Harding of any rights secured by the Constitution of the United States?

2) Whether amendment of the zoning ordinance by the Board violated the Equal Protection clause of the Fourteenth Amendment by treating Harding differently than others similarly situated?

District Court Order at 8; App. at 22a.

The District Court found that "the

action of the Board in revoking the permit was not arbitrary and capricious," App. at page 37a. The District Court concluded that Harding had a property interest in the permit as issued in November, 1983. App. at page 28a. The District Court reasoned that the "record of the hearing makes clear that the majority of landowners in the area were opposed to the timesharing development as proposed by Harding. It is of no moment that the Board reached an erroneous conclusion on that appeal." App. at page 39a. The District Court further reasoned that corrective action by Harding is better left to state courts.

D. Seventh Circuit Opinion Below

The Seventh Circuit opinion only summarily traced some of the key facts but omitted identification of the critical facts concerning the personal

and political uproar which caused the Board to cave in and revoke Harding's permit. Despite that, the Seventh Circuit concluded that the Board's decision was not irrational. However, the court did not apply the arbitrary and capricious test, the triviality test, or the shocks the conscience test.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT INCLUDING ARLINGTON HEIGHTS v. METROPOLITAN HOUSING DEVELOPMENT CORPORATION, 429 U.S. 252, 263 (1977) AND NUMEROUS CIRCUIT COURT DECISIONS RECOGNIZING THE APPLICATION OF SUBSTANTIVE DUE PROCESS TO LAND USE DISPUTES.

In Arlington Heights, 429 U.S. 252, 263 (1977), this Court expressly recognized the constitutional right to be "free of arbitrary or irrational zoning actions." While courts often invoke Justice Marshall's observation that ordinarily the role of federal courts

"should not be to sit as a zoning board of appeals," Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting), Arlington suggests that land use disputes are proper subjects of substantive due process inquiries under certain circumstances. See RRI Realty Corp. v. Inc. Village of Southampton, 870 F.2d 911, 914 (2nd Cir. 1989) (Illustrating the "willingness [of courts] to entertain a claim that a local land use regulator has acted arbitrarily or capriciously ...").

While the Seventh Circuit below correctly observed that a zoning decision denies substantive due process if it is invidious or irrational, 870 F.2d at 431, the court's reasoning is devoid of the appropriate methodological analysis and erroneously applied the strict irration-

ality test to the egregious facts of this case.

This Court has recently breathed new life into substantive due process. E.g., Daniels v. Williams, 474 U.S. 327, 331 (1986) (the touchstone of due process is the "protection of the individual against arbitrary action of government... The Due Process Clause ... was intended to secure the individual from the arbitrary exercise of the powers of government"); see id at 337-38 (Stevens, J., concurring); United States v. Salerno, 107 S.Ct. 2095, 2101 (1987) ("substantive due process prevents the government from engaging in conduct that 'shocks the conscience.'"); DeShaney v. Winnebago County Dept. of Soc. Serv., 103 L.Ed.2d 249, 259 (1989) ("the Due Process Clause... was intended to prevent government 'from abusing [its]

power...'"). Cf. Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982) (right to personal security protected by substantive due process); Parratt v. Taylor, 451 U.S. 527, 545 (1980) (Blackmun, J., concurring); Hudson v. Palmer, 468 U.S. 517, 541 n.4 (1984) (Stevens, J., concurring); City of Dallas v. Stanglin, 109 S.Ct. 1591, 1597 (1989) (Stevens, J., concurring); See Moore v. City of East Cleveland, 431 U.S. 494 (1977); Wells & Eaton, Substantive Due Process And The Scope Of Constitutional Torts, 18 Ga. L. Rev. 204, 210 (1984). Doe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting); Federal Deposit Ins. Corp. vs. Mallen, 108 S.Ct. 1780, 1787 (1988) (Due Process Clause prohibits arbitrary governmental interference with private sector employment relation); Browning-Ferris Industries of Vermont,

Inc. v. Kelco Disposal, Inc. 57 U.S.L.W. 4985, 4992 (Brennan, J., concurring); Kentucky Dept. of Corrections v. Thompson, 109 S.Ct. 1904, 1908 (1989).

The Seventh Circuit's decision below inherently conflicts with this line of cases recognizing that substantive due process is a viable tool to attack arbitrary and capricious governmental conduct. The Seventh Circuit's decision as applied to the egregious facts of the case sub judice renders the substantive component of the due process clause a nullity. The test employed by the Seventh Circuit is unrealistically strict and represents a narrow minority position. The Daniels v. Williams, 474 U.S. 327, 331 (1986) type test is more appropriate and should be the national standard as indicated by the majority of circuit cases following Daniels.

Unquestionably, "substantive due process has returned." Karst, The Freedom of Intimate Association, 89 Yale L.J. 624, 664 (1980); See Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632, 640 (1974), and other cases cited supra.

The lower courts desperately need guidance and instruction from this Court concerning how to apply substantive due process in a land use dispute. In Silverman v. Barry, 845 F.2d 1072, (D.C. Cir. 1988), the court observed that "[t]he Supreme Court has not enumerated a standard by which to determine precisely which state lapses constitute substantive due process violations under 42 U.S.C. section 1983." At least since Arlington Heights, substantive due process is a viable means to attack a land use decision, but the lower court cases are

devoid of a consistent test to be employed.

The Seventh Circuit employed the overly general and unrealistic invidious or irrational" methodology, but failed to apply the more specific and improved standards enunciated by most other courts. See, e.g., Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) ("arbitrariness, abuse of discretion, caprice, or unfairness..."). Bello v. Walker, 840 F.2d 1124 (3rd Cir. 1988) ("the deliberate and arbitrary use of government power violates an individual's right to substantive due process.").

This Court should grant the writ because the Seventh Circuit failed to employ the correct arbitrary and capricious standard. The Seventh Circuit erroneously found that Door County's revocation of Harding's building permit

and the rezoning of his property was not irrational despite the fact that construction of the housing was already proceeding, that the opposition to Harding's project was political, and that the Wisconsin Court of Appeals found the revocation to be illegal. See State ex. rel. Harding v. Door County Adj. Bd., 371 N.W.2d 403 (1989).

This Court previously defined arbitrary as "without adequate determining principle ... or fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances, or significance ..." Capricious was defined as "apt to change suddenly; freakish, whimsical ..." United States v. Carmack, 329 U.S. 230, 243 n. 14 (1946). Harding's evidence raised genuine issues of material fact regarding

the arbitrariness of Door County's revocation of Harding's permit. The arbitrary and capricious determination is a jury question. E.g., Bergstrom v. Buettner, 697 F.Supp. 1099, 1102 (D.N.D. 1987); see Trujillo v. Goodman, 825 F.2d 1453 (10th Cir. 1987); Checki v. Webb, 785 F.2d 534, 536 (5th Cir. 1986).

Harding's evidence clearly revealed that Door County succumbed to local political and personal animus which gave rise to the revocation. Such political and personal animus has expressly been held by courts to constitute a violation of substantive due process in a land use dispute. E.g., Brady v. Colchester, 863 F.2d 205, 216 (2nd Cir. 1988) (reversing summary judgment for City where building permit was revoked; substantive due process recognized where "plaintiffs may be able to prove that they were denied a

permit and use of their property not because of a good faith mistake ... but because of indefensible reasons such as impermissible political animus."); Bello v. Walker, 840 F.2d 1124 (3rd Cir. 1988) (evidence that council members interfered with process by which building permits are issued for partisan political and personal reasons is sufficient for substantive due process violation.) Cf. Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982) (political pressure giving rise to local referendum causing planned housing construction to stop held to violate equal protection).

Moreover, the retroactive zoning amendment provides an independent basis for a substantive due process violation.

II. THERE IS A DIRECT CONFLICT BETWEEN NUMEROUS CIRCUIT COURTS CONCERNING THE APPLICATION OF SUBSTANTIVE DUE PROCESS TO LAND USE AND PERMIT DECISIONS

The Circuit courts are hopelessly split on a host of substantive due process issues in land use and permit cases including the critical standard of proof issue. Generally, the Second, Third, the Fourth, Sixth, Ninth, Tenth and Eleventh Circuits apply substantive due process to protect "the individual against arbitrary action of government" as mandated by this Court in Daniels and other cases cited supra. The First, Seventh, and Eighth Circuits are generally hostile towards substantive due process, at least as applied to land use matters. But even in those circuits, the proof standards are mixed and unclear, and some cases have recognized substantive due process. The mixed Fifth Circuit cases highlight the standard of proof confusion.

Perhaps the leading recent circuit

case directly on point is Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) where the court recognized substantive due process "where there is fairly alleged a basis for finding either 'abuse of discretion or caprice in a zoning administrator's refusal to issue' a building permit. Id. at 1419. The court employed the "arbitrariness, abuse of discretion, caprice or unfairness" test. Id. The background of Scott where the county unlawfully intervened in the permit process is strikingly similar to the case sub judice. In McCauley v. City of Jacksonville, (4th Cir., No. 86-1674, Sept. 8, 1987 unpublished decision), the Fourth Circuit followed Scott in a strikingly similar case involving revocation of a building permit and rezoning after community opposition to a housing project, just as in this case.

In Bello, 840 F.2d 1124, 1129 (3rd Cir. 1988) the Third Circuit held that "the deliberate and arbitrary abuse of government power violates an individual's right to substantive due process." Just as in this case, the municipality in Bello interfered with the developer's permit process for political and personal reasons.

In Brady vs. Town of Colchester, 863 F.2d 205 (2nd Cir. 1988), the Second Circuit applied substantive due process to the denial of a building permit as a result of political animus. See Silverman v. Barry, 845 F.2d 1072 (D.C. Cir. 1988) ("a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law..... qualifies for [substantive due process] relief.").

In Bateson v. Geisse, 857 F.2d 1300

(9th Cir. 1988), the Ninth Circuit found that the housing developer plaintiff was arbitrarily denied a building permit and his property was rezoned to prevent the proposed project, as in this case. The court found that the defendant acted arbitrarily by denying Bateson's permit because he had satisfied all requirements for the permit, just as in this case. The same was true in Southern Coop. Dev. Fund v. Driggers, 696 F.2d 1347, 1356 (11th Cir. 1983) (since plaintiffs had indisputably complied with the requirements of the ordinance as in the case sub judice, defendant's refusal was held to be a violation of due process). Accord Landmark Land Co. of Oklahoma v. Buchanan, 874 F.2d 717 (10th Cir. 1989) where the court recognized that a plaintiff may recover on a substantive due process claim if deprived of a property or liberty interest "in an

arbitrary fashion," citing Usury v. Turner Elkorn Mining Co., 428 U.S. 1, 15 (1976).

Cf. Benigni v. City of Hemet, 868 F.2d 307, 312 (9th Cir. 1989) (substantive due process claim and verdict upheld for "arbitrary law enforcement activity.").

In Wilkerson vs. Johnson, 699 F.2d 325 (6th Cir. 1983), the Sixth Circuit held that the denial of a license because of bias and the desire to avoid competition violates substantive due process. Accord Southern Coop. Dev. Fund v. Driggers, 696 F.2d 1347, 1356 (11th Cir.), cert. denied, 463 U.S. 1208 (1983) (imposition of requirements not in the relevant ordinance violates substantive due process). See Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989) (applying both shocks the conscience test and Wilkerson

arbitrary and capricious test in an employment case).

The Eighth Circuit has issued palpably inconsistent decisions. In Littlefield v. Afton, 785 F.2d 596, 607 (8th Cir. 1986), the court held that a substantive due process claim could be premised upon an arbitrary and capricious denial of a building permit. Accord Cunningham v. Overland, 804 F.2d 1066, 1069 (8th Cir. 1986) (arbitrary and capricious denial of a merchant's license states substantive due process claim). But cf. Lemke v. Cass County, 846 F.2d 469 (8th Cir. 1987) (en banc), and concurrence of Judge Arnold, id. at 471. However, the Eighth Circuit has recognized that substantive due process precludes an arbitrary and capricious discharge of a public employee. Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973)

(arbitrary, capricious and triviality test employed); Moore v. Warwick Public School Dist., 794 F.2d 322 (8th Cir. 1986). Moreover, in Chernin v. Lyng, 874 F.2d 501 (8th Cir. 1989) the Eighth Circuit held that substantive due process even precludes arbitrary government interference with a private sector employment relation. See Harrah Independent School Dist. v. Martin, 440 U.S. 194 (1979) (implicitly recognizing right to be free from arbitrary and capricious state action.)

In Shenck v. Zoning Commission, 440 F.2d 295, 297 (D.C. Cir. 1971), the District of Columbia Circuit held that the denial of a rezoning application was arbitrary and capricious thus violative of substantive due process. Accord Norton v. Macy, 417 F.2d 1161, 1164 (D.C. Cir. 1969) (substantive due process "forbids

all [public employee] dismissals which are arbitrary and capricious.").

An almost identical scenario was presented in Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. 1981), cert. denied, 456 U.S. 973 (1982). There the City passed an ordinance forbidding construction of new apartments following a community "uproar" of resistance to the housing project. The court held the City's conduct to be arbitrary and capricious.

In Brennan v. Stewart, 834 F.2d 1248 (5th Cir. 1988), the Fifth Circuit identified various types of substantive due process claims, in a permit case. There, the plaintiff premised his claim upon the "means/ends strand of 'substantive' due process doctrine," as opposed to the shocks the conscience or other tests. In Shelton v. City of

College Station, 780 F.2d 475 (5th Cir. 1986) (en banc), the court adopted a narrow test for a facial attack on a zoning ordinance. There, building lessees brought suit following denial of variances to a zoning ordinance requiring a specified number of off-street parking places for different types of businesses. The majority opinion held that zoning decisions are reviewed by the same constitutional standards that are used in reviewing statutes enacted by state legislatures. Id. at 479. However, the dissent in Shelton amply illustrates why this Court should grant the writ and clarify these issues: "The appropriate standards by which the constitutionality of such a board's action is reviewed requires that we ask whether the action is arbitrary and capricious having no substantial relation to the general

welfare." Id. at 490. See Hearn v. City of Gainesville, 688 F.2d 1328, 1332 (11th Cir. 1982) (substantive due process verdict upheld where the employee was discharged due to animosity of the department head which was "for an improper motive and by means that were pretextual, arbitrary, and capricious..."). Accord Johnson v. Branch, 364 F.2d 177, 181 (4th Cir. 1966), cert. denied, 385 U.S. 1003 (1967) (same). Cf. Barnett v. Hous. Auth., 707 F.2d 1571, 1577 (11th Cir. 1983) (arbitrary and capricious test applicable in employee substantive due process claim); Schaper v. City of Huntsville, 813 F.2d 709, 717 (5th Cir. 1987) (same).

The extremely deferential "at least debatable" test set forth in the majority opinion in Shelton is a wholly

unrealistic standard which renders substantive due process meaningless in land use disputes. While styling it slightly differently, the Seventh Circuit in the case sub judice applied essentially the same inadequate test.

The First Circuit is generally hostile to substantive due process in land use and permit disputes. E.g., Chiplin Enterprises v. City of Lebanon, 717 F.2d 1524 (1st Cir. 1983). But cf. Roy v. City of Augusta, 712 F.2d 1517, 1523 (1st Cir. 1983) (recognizing substantive due process theory where operator of a pool hall was denied the fruits of his state court victory to renew his business license by "arbitrary actions of the defendants.") Cf. Drown v. Portsmouth School Dist., 451 F.2d 1106, 1108 (1st Cir. 1971) (triviality test applied in employment case).

The foregoing demonstrates that the compelling weight of authority affords substantive due process protection to plaintiffs like Petitioner John Harding. However, stark differences remain between the circuits concerning the all-important standard of proof issues.

III. THE CONFLICTING AND UNCERTAIN STANDARDS OF PROOF FOR SUBSTANTIVE DUE PROCESS CLAIMS PRESENTS A SUBSTANTIAL FEDERAL QUESTION THAT REQUIRES THIS COURT'S ATTENTION

The recent explosion of substantive due process cases in land use and permit matters contains troublesome fundamental questions which call for this Court's attention. Most of the cases recognizing or applying substantive due process usually do so summarily with little or no genuine methodological analysis.

Does one apply the arbitrary and capricious test, the triviality test, or the shocks the conscience test? Is the

extremely deferential "at least debatable" test sufficient? What proof is necessary in order to satisfy the appropriate test? Does one apply the equal protection proof factors enunciated in Arlington, 429 U.S. at 266-68? These questions are baffling the Circuit Courts, and as the District of Columbia Circuit implied in Silverman, it is time for this Court to step in.

Abusive governmental obstruction of housing projects such as in this case has far reaching economic and social ramifications. See generally, McGuinness, Fundamental Issues In Housing Discrimination Litigation, 14 N.C. Cent. L.J. 555 (1984). Such obstruction exacerbates the national housing crisis and promotes a decline in community and economic development. Moreover, it

impedes the efficient functioning of traditional economic markets.

Here, Door County's 22 month scheme of illegal obstructive tactics damaged Harding so appreciably that he personally was economically unable to proceed with his project after the Wisconsin Court of Appeals found that Harding's permit was illegally revoked and the state supreme court denied the County's petition for review.

CONCLUSION

This case presents this Court with an opportunity for resolving the important substantive due process issues presented herein for the benefit of Petitioner and the lower courts. Therefore, Petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the decision below.

RESPECTFULLY SUBMITTED,

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APPENDIX

Opinion of the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 88-2352

JOHN T. HARDING,

Plaintiff-Appellant,

v.

COUNTY OF DOOR,

Defendant-Appellee.

Appeal from a Final Decision and Order of the United States District Court for the Eastern District of Wisconsin.
No. 86-C-1142 - Joseph P. Stadtmueller, Judge.

ARGUED JANUARY 17, 1989 - DECIDED MARCH 20, 1989

Before WOOD, JR., POSNER and FLAUM, Circuit Judges.

FLAUM, Circuit Judge. John Harding appeals from the district court's entry of summary judgment in favor of defendant Door County, Wisconsin. We affirm.

I.

In 1983, plaintiff John T. Harding, decided to develop a tract of land he owned in Door County, Wisconsin. Harding's plan of development contemplated the construction of fourteen single family homes to be sold on a condominium time-share basis. Under this plan, a purchaser of a time slot would have exclusive possession of a particular home for one week during each season of the year. Thus, it was theoretically possible for thirteen different families to reside in a single home during the year.

In accordance with Wisconsin zoning provisions, Harding submitted his plans for the project to a zoning administrator. The zoning administrator determined that the plans complied with the terms of the relevant zoning

ordinance and issued the permit. Construction on the first of the houses commenced soon afterwards.

After construction on the project was already underway, a neighboring landowner, concerned about the possibility of multiple tenants occupying a single home, petitioned the Door County Board of Adjustment ("Board") to overturn the administrator's decision. The Board conducted a public hearing on the issue and ultimately determined that single family time-share condominiums were not permitted under the relevant zoning ordinance. As a result, the Board revoked Harding's building permit.

Harding unsuccessfully appealed the Board's decision to the Circuit Court of Wisconsin. The Wisconsin Court of Appeals, however, eventually reversed the lower court and ordered the Board to reinstate the permit. By this time,

however, Harding lacked the financial capability to complete the project.

After triumphing in the appellate court, Harding, pursuant to 42 U.S.C. 1983, filed suit against Door County in the district court alleging that the revocation of his building permit violated his substantive due process rights. The parties filed cross-motions for summary judgment and, in July 1988, the district court granted Door County's motion. Harding appeals from this decision.

II.

Harding's principal argument on appeal is that the Board violated his substantive due process rights by revoking his building permit. A zoning decision denies substantive due process only if it is invidious or irrational. Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988).

Therefore, Harding must demonstrate that the Board's decision revoking his building permit was invidious or irrational.

Plaintiff argues that the Board's zoning decision was irrational because it lacked authority under Wisconsin law to revoke a building permit once it determined that the building complied with the zoning ordinance's structure or use requirements. This court, however, rejected a similar argument in Coniston stating:

> This case presents a garden-variety zoning dispute dressed up in the trappings of constitutional law-a sure sign of masquerading being that the plaintiffs do not challenge the constitutionality of the zoning ordinances..... but argue rather that the Board of Trustees had no authority under those ordinances to reject their site plan once the Village Plan Commission had approved it. If the plaintiffs can get us to review the merit of the Board of Trustees decision under state law, we cannot imagine what zoning dispute could not be shoehorned into federal court in

> this way, there to displace or postpone consideration of some worthier object of federal judicial solicitude.

844 F.2d at 467 (emphasis added). Moreover, if this argument had merit, we find it remarkable that the Wisconsin Court of Appeals failed to address it in its decision.

Plaintiff also contends that the Board's decision itself was irrational. This argument, too, is without merit. The record reveals that the Board rendered a reasoned decision based on a perfectly logical interpretation of the relevant zoning ordinance. In interpreting the ordinance the Board analyzed the rationale underlying the statute and rendered a decision that it believed was consistent with the intent of the legislature that drafted it. Although the Wisconsin Court of Appeals ultimately determined that the Board's interpretation of the zoning ordinances

was erroneous, this fact does not transform the Board's rational decision into an irrational one.

Finally, plaintiff argues that the Board engaged in intentional discrimination against him. Intentional discrimination may be shown by evidence indicating a discriminatory design to favor one individual over another. Scudder v. Town of Greendale, Ind., 704 F.2d 999 (7th Cir. 1983). This claim, like its predecessors, is completely without merit. Harding has adduced no evidence demonstrating that the Board has approved a similar development project in the past.

We conclude by reminding potential litigants that the federal courts are ordinarily not vehicles to review zoning board decisions. Accordingly, we urge both potential litigants and their attorneys to read this opinion in

conjunction with our previous decision in Coniston before commencing a suit challenging a zoning decision in federal court.

Affirmed.

Opinion of the
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOHN T. HARDING,

Plaintiff,

Case No. 86-C-1142

vs.

COUNTY OF DOOR, a body corporate, ROBERT FLORENCE, LYLE HILL, HARVEY MALZAHN, DAVID SAUTEBIN, and AL HILBERT,

Defendants.

DECISION AND ORDER

Plaintiff John T. Harding filed his complaint on October 21, 1986 seeking damages, injunctive and declaratory relief for the alleged deprivation by defendants, under color of law, of rights, privileges and immunities secured to the plaintiff by the Fifth and Fourteenth Amendments to the Untied States Constitution. Harding seeks damages and injunctive relief

pursuant to 42 U.S.C. 1983 and 1988, and declaratory relief pursuant to 28 U.S.C. 2201. Jurisdiction is alleged to be proper in this court under 28 U.S.C. 1331 and 1343. Harding sued each of the individual defendants in both their individual and official capacities.

On November 18, 1986, defendants jointly filed an answer denying liability, and stating numerous affirmative defenses. On May 4, 1987, defendant Door County filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56(b), as well as a motion for dismissal, pursuant to Fed. R. Civ. P. 12(b) and (d), as to the punitive damage claim, and for an order of dismissal pursuant to Fed. R. Civ. P. 12(b), (d), and (h)(3) as to the requests for declaratory and injunctive relief. Door County's motion also sought actual costs and reasonable attorney's fees pursuant

to 48 U.S.C. 1988. Harding opposed Door County's motion by filing a cross motion for partial summary judgment as to liability only on his compensatory damage claim, and for judgment on his claims for injunctive and declaratory relief. Harding's motion was filed on June 8, 1987. The cross motions for summary judgment were fully briefed as of August 17, 1987. On September 1, 1987 Chief Judge Robert W. Warren, to whom this case was originally assigned, transferred the file to this branch of the court following my appointment to the federal bench. Both motions are now ready for resolution.

Pursuant to a stipulation of the parties an order was entered on May 5, 1987 dismissing, with prejudice, the claims against each of the individual defendants. As a result of this dismissal, Harding concedes that his

request for punitive damages is no longer viable, since municipalities are immune from punitive damage claims under the Civil Rights Act. Newport v. Fact Concerts, Inc., 452 U.S. 247, 271 (1981). Therefore, the punitive damage claim will be dismissed.

The following facts, taken essentially as summarized in Harding's brief n support of his motion for partial summary judgment, are undisputed. Harding owns a tract of land in the Town of Liberty Grove, Door County, Wisconsin which consists of approximately 35 acres. 1 This tract of land is zoned single-family residential (R-1). Harding, who describes himself as a

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1 Harding's brief states that the tract of land is "approximately 25 acres." This appears to be a typographical error. The brochure used to promite the development refers to "35 acres of woods and meadows." Additionally, 14 homes, each located on 2-1/2 acres, would require at least 35 acres.

builder and a real estate agent, decided in 1983 to develop this parcel of land by constructing 14 single-family homes thereon, each of which would be sold as a condominium on a timeshare basis.

The purchaser of a timeshare segment would have an undivided interest in fee in the condominium project, and be entitled to use his or her respective home for four weeks during the year, one week in each season. Assuming a purchaser bought only one segment, the arrangement contemplated 13 owners for each home.

Prior to seeking the necessary zoning permits from Door County, Harding retained a surveyor to prepare a condominium plat which provided for 14 contemplated buildings to be clustered in the center of the property. Harding also had soil borings performed on each site so that a preliminary determination

could be made as the feasibility of installing a septic system. This information was then presented to the Door County Planning Department (Planning Department), which had the initial responsibility for issuing zoning permits. At the same time, Harding submitted an application for a building permit for site 3, the first home to be constructed. Harding also submitted the necessary sanitary permit for site 3. The Planning Department was informed of Harding's intention to sell the units on a timeshare basis.

Before approving Harding's plan of development, the Planning Department informed him that each home would have to be located on its own 2-1/2 acre parcel to meet the R-1 zoning requirements. Harding had the property resurveyed and filed a new condominium plat which provided for the required

site acreage. The overall plan was approved by the Planning Department as submitted.

Harding's zoning permit was issued in November 1983 by the Planning Department. Prior to issuance of the permit, the zoning administrator checked the county setback requirements, lot size, building plans, square footage requirements and sanitary permit and found that Harding had met all the requirements of the county's zoning ordinances relating to single-family residences constructed in R-1 Residential districts. Harding presold seven of the 13 timeshare segments for unit no. 3 and also obtained a one-year construction loan in the amount of $100,000.

After the permit was issued, an adjoining landowner, Leslie Cowen, filed a petition with the Door County Board of Adjustment (the Board), appealing the

Planning Department's issuance of the zoning permit to Harding. Mr. Cowen's appeal alleged that Door County's zoning ordinance did not permit the timeshare-type development in an R-1 district. The Board, after a published notice and hearing, agreed with Cowen and revoked Mr. Harding's building permit on February 7, 1984 by a formal written decision. At that juncture, unit 3 was only partially constructed.

Harding then appealed the Board's decision to the Door County Circuit Court pursuant to Wis. Stats. 59.99(10). The circuit court judge affirmed the Board's decision by a written, unpublished decision dated July 30, 1984. By letter dated August 4, 1984, the Planning Department reissued Mr. Harding's permit for unit 3, with the condition that once constructed it could not be sold on a timeshare basis.

Harding appealed the circuit court decision to the State of Wisconsin Court of Appeals which, in a published decision, reversed the trial court. State ex rel John T. Harding v. Door County Board of Adjustment and Leslie E. Cowen, 125 Wis. 2d 269, 371 N.W. 2d 403 (Ct. App. 1985). This decision was issued on June 11, 1985, approximately 20 months after Harding's permit was first issued. Door County petitioned the Wisconsin Supreme Court for a review of the Court's of Appeal's decision. Door County's petition was denied by the Wisconsin Supreme Court on September 10, 1985.

What ocurred next is a matter of some dispute. Harding contends that in either October or November 1985 he had a discussion with Robert Florence, the head of the Planning Department, in which Harding asked Florence if he was

now ready to issue the additional 13 permits. Florence allegedly responded that if applications were filed they would first have to be reviewed by the Board before the Planning Department could act on them. Harding alleges that this review would have been contrary to the established procedure used by the county in granting permits. Mr. Florence denies that the conversation took place or alternatively states that he cannot remember such a conversation taking place. In any event, Harding, allegedly in reliance upon the conversation with Florence, did not file applications for the additional permits. Instead, he retained counsel who filed a notice of claim against the county in November, 1985. The claim was denied on April 10, 1986 and Harding commenced suit for compensatory damages against Door County in the circuit court. The state court

action was dismissed by a stipulation of the parties sometime after October 21, 1986, the date the instant action was filed. 2

By Ordinance No. 23-86, the Door County Board of Supervisors amended the Door County Zoning Ordinances in March 1986, which became effective May 4, 1986, the consequences of which was to prohibit the type of development proposed by Harding on property zoned R-1. Under

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2 Apparently, it is the change in procedure for issuing the additional 13 permits upon which Mr. Harding orginally based his procedural due process claim before this court. Mr. Harding admits in his brief that he failed to pursue his state post-deprivation remedies before bringing the present claim as required by the holdings of Parratt v. Taylor, 451 U.S. 527 (1981), and Daniels v. Williams, _____ U.S. _____ 106 S.Ct. 662 (1986). Consequently, Mr. Harding is willing to stipulate to the dismissal of his claim for damages based on a precedural due process deprivation of his constitutional rights. Therefore, the court need not concern itself with the factual disparity since it does not impact on the remaining issues before the court.

the amended ordinance, the zoning restrictions applicable to any timesharing condominium project depend, among other things, upon the period of time the dwelling unit will be occupied by each occupant. When the occupancy interval is 30 days or less (as originally planned by Harding) the zoning restrictions governing Recreational, Shoreland Community, Rural Community or Resort Commercial zoning districts may apply. If the occupancy interval is more than 30 days, the restrictions governing single-family residential districts may apply. Door County alleges that the zoning ordinance does not prohibit the construction of Harding's development (called Maple Wood Estates) as originally planned, but would require Harding to either change the occupancy intervals or obtain rezoning. It is undisputed that Harding has never

applied for zoning permits under the amended ordinance, nor has he applied for rezoning of the property. Additional facts will be stated as necessary below.

ANALYSIS

As a result of the parties' briefing of the cross-motions for summary judgment, several issues have been resolved through concessions of the parties. For instance, Harding has conceded the punitive damages issue, see supra ps. 2, and has conceded the procedural due process issue, see supra p. 6, n.1. Harding has also conceded that this case does not present a controversy involving the Fifth Amendment takings clause, or an inverse condemnation question. See plaintiff's brief in support of motion for summary judgment, p. 31. Door County has conceded that issues of respondeat superior and whether a municipal policy

or custom is involved in this case need not be resolved by the court. See defendant's reply brief at p. 5. In effect Door County has conceded that the Board was a policy-making body for whose actions Door County may be liable. The issues which remain to be resolved can be stated at (1) whether revocation of Mr. Harding's zoning permit by the Board deprived Mr. Harding of any rights secured by the Constitution of the United States?; and (2) whether amendment of the zoning ordinance by the Board of Supervisors violated the Equal Protection Clause of the Fourteenth Amendment by treating Mr. Harding differently than others similarly situated people?

Revocation of the Zoning Permit

Door County alleges that it is entitled to summary judgment on this claim for two reasons. First, Harding cannot prove that a constitutionally-

protected right was denied him by the Board's revocation of the zoning permit. Second, even if Harding can prove the deprivation of a constitutionally right, the action of the Board in revoking the permit was not arbitrary and capricious. Valid reasons were given for revoking the permit, which are further evidenced by the fact that the two reviewing courts reached different opinions on the correctness of the Board's action.

Harding contends that the revocation of the permit, and the resulting 20-month delay before the court of appeals reversed the Board's decision, caused him substantial harm both monetarily and to his reputation. This harm precluded him from proceeding with his development and he lost income and profits from the development, as well as incurred substantial legal fees and costs in connection with appealing

the Board's decision. Harding also contends that the Board's decision was arbitrary and capricious because the Board lacked any discretion in its review of the planning administrator's decision and therefore the revocation of the permit was unreasonable as a matter of law. Finally, Harding contends that the Board's failure to review the Door County ordinances in question, or to seek legal advice, or to accept the legal opinion of its zoning administrator, David Sautebin, makes the revocation of Harding's zoning permit arbitrary as a matter of law.

Harding relies on Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) and Littlefield v. City of Afton, 785 F. 2d 596 (8th Cir. 1986) for the proposition that building permits are a constitutionally protected property interest.

> Property interests, of course, are not created by the constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and the support claims of entitlement to those benefits.

Board of Regents vs. Roth, 408 U.S. 564, 577 (1972). In Scott, the court determined that the plaintiff "enjoyed an entitlement to the issuance of a permit upon presentation of an application and plan showing a use expressly permitted under the then current zoning ordinances." 716 F.2d at 1418. The court's conclusion in Scott was based on its interpretation of South Carolina law. The Littlefield court also found that an applicant for a building permit had a "constitutionally protected property interest in the permit, which is conditioned only by compliance with the ordinances." 785 F.2d at 602. This conclusion was based

on Minnesota state law and the ordinance of the city of Afton.

In State ex rel City Service Oil Company v. Board of Appeals, 21 Wis. 2d 516, 124 N.W. 2d 809 (wis. 1963), the court addressed the issue of whether an applicant for a building permit had a vested interest in that permit once it was issued and the property owner proceeded with his construction plans in reliance on the building permit [much as Harding contends he did in this case]. The court determined that the issuance of the building permit alone did not create any vested rights in the property owner. This conclusion was based upon the fact that the Milwaukee zoning in effect at the time provided "the issuance of a [building] permit ... shall not be deemed or construed to be a permit for, or an approval of, any violation of any of the regulations of this code." 21

Wis. 2d at 530. The court also analyzed the building inspector's issuance of the permit and his interpretation of the zoning ordinance in question (where he determined that the requested use was one permitted under the ordinance) was "... clearly not a reasonable interpretation but a legally erroneous one." 21 Wis. 2d at 529. The Wisconsin court has continued to hold, even in the absence of an ordinance such as that of Milwaukee's quoted above, that a building permit grants no vested rights to unlawful use. Jelinski v. Eggers, 34 Wis. 2d 85, 93 148 N.W. 2d 750 (1967).

Door County makes no contention that Harding's proposed development was an unlawful use under the ordinance. Indeed, in light of the Wisconsin Court of Appeals' decision on Harding's petition for a writ of certiorari, the county could not make such a suggestion.

The Wisconsin Court of Appeals found that Harding's proposed use fell within the definition of a single-family dwelling as defined by the Door County ordinances. 125 Wis. 2d at 271. In addition, the Door County Ordinance, sec. VI(c)3b makes the issuance of a regular zoning permit mandatory on the zoning administrator "... Following receipt of a completed application for same, after review and upon finding that such use or structures is in full compliance with requirements of this ordinance." (Door County Zoning Ordinance (June 11, 1968), as updated, August 31, 1986.) Clearly Harding had a protected property interest in the zoning permit as issued in November 1983.

I must next determine whether the action of the Board in revoking that permit constitutes a violation of Harding's substantive due process

rights. To prevail on this theory, Harding must "... Allege and prove that the zoning ordinances or the uniform building code or whatever other legislative enactment may be controlling here is arbitrary and unreasonable or that its application bears no substantial relation to the public's health, safety or morals." Albery v. Redding, 718 F.2d 245, 251 (7th Cir. 1983). When the plaintiff does not challenge the validity of the ordinance in question (which Harding does not, at least prior to the amendment which will be discussed infra), the analysis focuses on the application of the ordinance. "It is well settled that enforcement of an otherwise valid zoning ordinance violates the Constitution only if: (1) a decision of the particular zoning body is arbitrary ...; or (2) if the ordinance is applied or enforced with a

discriminatory intent or purpose." Scudder v. Town of Greendale, Indiana, 704 F.2d 999, 1002 (7th Cir. 1983) (citations omitted). "A particular decision or action is 'arbitrary' that is reached without adequate determining principle or was unreasoned." Id. (citations omitted). Harding relies on the powers granted to the Board by its enabling legislation, Wis. Stat. 59.99 and on the reason given by the Board to show that (a) no valid reason was given for revocation of the permit, and (b) even if a rational basis was given for revoking Harding's permit, such action would still be unreasonable because the Board lacked any authority or discretion to revoke the permit.

Wis. Stat. 59.99, entitled "County Zoning, Adjustment Board," enables counties to establish boards of adjustment, defines the personnel

make-up of such boards, contains the rules the boards must operate under and provides for a court review of board decisions. The statute also defines the powers of the board of adjustment as follows:

> (7) Powers of Board. The board of adjustment shall have the following powers:
>
> (a) to hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of sec. 59.97 or of any ordinances adopted pursuant thereto.
>
> (b) to hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.
>
> (c) to authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, so that the spirit of the ordinance shall be observed and substantial justice done.

> (d) to grant special exceptions in variances for renewable energy resource systems ...
>
> (8) ORDER ON APPEAL. In exercising the above mentioned powers, such board may, in conformity with the provisions of this section, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.

I am not convinced from a reading of the statute that the Door County Board of Adjustment's authority is limited to the extent Harding contends. In State ex rel City Service Oil Company, supra, the Wisconsin Supreme Court determined that zoning boards of appeals did have the power to revoke the zoning

permits. 21 Wis. 2d at 525.3 Subparagraph (8) above gives the board of appeals "all the powers of the officer from whom the appeal is taken." The same paragraph also grants the Board power to reverse or affirm or modify the order or decision of the zoning officer. There is nothing in the statute which limits the board's power solely to that possessed by the zoning officer. Therefore, although I agree with Harding that the zoning administrator's, Sautebin's, decision to originally issue the permit was mandatory once Harding had met the provisions of the ordinance,

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3 State ex rel City Service Oil Company was decided under Wis. Stat. 62.23(7) which is the enabling legislation for city planning departments and city zoning ordinances and allows for the establishment of a board of appeals by the city. The language used in 62.23(7)(e) 7 and 8 is substantially similar to that used in Wis. Stat. 59.99. Presumably county boards of adjustment possess the same power as city boards of appeals. C.f. Schneider v. Waukesha County Zoning Board of Adjustment, 74 Wis. 2d 468, 247 N.W. 2d 98 (Wis. 1976).

it does not follow that the Board's decision to revoke the permit followed a hearing on the appeal was beyond the scope of the Board's powers granted by statute. Therefore, Harding's second argument must fail.

The Board concluded after the hearing that the timeshare use as proposed by Harding was not permitted in a district zoned R-1, which allowed only single-family residential development. The reasons stated by the Board were as follows:

> The decision by the zoning administrator to issue a zoning permit to authorize construction of a residence which will be part of a "timesharing" facility, on lands zoned R-1 was not in conformance with the requirements and intent of the zoning ordinance.
>
> (1) To uphold the issuance of the zoning permit would essentially alter the true spirit and purpose of the R-1 zoning district than was originally intended and would set a precedent for future developments on land zoned R-1. The proposed use of the residence is beyond the use which is contemplated in the

definition of a single-family dwelling contained in the zoning ordinance.

(2) The use of a property is an important function of zoning as well as the physical lay-out of a facility. Many aspects of the proposed development are so similar to that of a resort that it becomes difficult to differentiate between the two. Some similarities are: semitranscient occupants, common use or ownership of facilities, and managerial and hired maintenance personnel. The zoning ordinance allows resorts in the Recreational (Rec), Shoreland Community (SC-1), and Resort [community] (C-2) Zoning Districts and the applicant could petition to rezone the property. In contrast, the intent, in part, of the R-1 zoning district is to provide for high quality single-family residential development.

(3) Allowing this use would destroy the R-1 zoning district as we know it and would be contrary to public interest.

Door County makes two arguments in support of its position that the board's decision was not arbitrary. The first is that it is "ludicrous to suggest there was no conceivable rational basis for the board's decision when that

decision was later affirmed by the circuit court on certiorari... or to suggest that the decision was not debatable when the two courts which later reviewed it reached different conclusions." Def. Rep. Br. at 11. The second argument is based on Shelton v. The City of College Station, 780 F.2d 475, 477 (5th Cir. 1985), Cert. denied 107 S.Ct. 89 (1986). The court in Shelton held that the requirement of substantive due process is met if there is any conceivable rational basis for the decision reached by the board. There is no denial of substantive due process if the board's decision is "at least debatable," Id. at 483, and a determination of whether the zoning decision is arbitrary an capricious is not dependent upon trail type proof of record facts concerning the basis for the decision maker's conclusion. Id. at

480-481.

Harding first points out that the rule of law set forth in Shelton is not the law in the Seventh Circuit. See Scudder, 704 F.2d 999; Littlefield v. City of Afton, 785 F.2d 596, 603-608 (8th Cir. 1986). In support of his position, Harding also relies on the fact that both Al Hilbert, the Board chairman, and Lyle Hill, the Board secretary, admitted in their depositions that Harding's structure met the definition of single-family dwelling and that the Board sought no legal opinions nor did they refer to the ordinances themselves during deliberations on the appeal.

After reviewing the materials on file in this case, I cannot conclude that the Board's decision in revoking Harding's permit was arbitrary and capricious. As the Seventh Circuit

stated in Scudder, "a particular decision or action is 'arbitrary' if it is reached 'without adequate determining principle or was unreasoned.'" 704 F.2 at 1002. I cannot conclude that the Board's revocation of the permit bears "no substantial relation to the public health, safety or morals." Albery, supra, 718 F.2d at 251. Notwithstanding the lack of reference to the Door County ordinances in reaching its decision, the Board did hold a hearing on the appeal and took testimony not only from the appellant's (Leslie Cowen) attorney and Harding's attorney on whether or not this proposed was possible in an R-1 district, but also accepted testimony from other concerned property owners in the area. The record of that hearing makes clear that the majority of landowners in the area were opposed to the timesharing development as proposed

by Harding. It is of no moment that the Board reached an erroneous conclusion on that appeal. As the Scudder court noted, "It is not 'the function of federal district courts to serve as zoning appeals boards...'" 704 F.2d at 1003 (quoting Nasser v. City of Homewood, 671 F.2d 432, 440 (11th Cir. 1982)). The Wisconsin statutes allow for judicial review of the board's decisions. Wis. Stat. 59.99(10). That review is to be sought in state court, not federal district court. Harding did avail himself of that procedure and following his successful appeal, failed to avail himself of the right to continue with his development.

This case is similar to that of Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) where the court held that the plaintiff could recover for the damages resulting from the

county council's moratorium on issuing permits. However, in that case the Fourth Circuit held that the council's actions directed at plaintiff and his proposed low income housing were "extraordinary, extralegal, and in derogation of its regular practice of noninvolvement in permit issuance." 716 F.2d at 1421. In addition, the Fourth Circuit found that the council contravened an express section of its own zoning ordinance. Id. at 1419. No such finding can be made here with regard to the board's actions in revoking Harding's permit. As previously stated, the board's actions may have been erroneous, but correction of that type of error is better left to the state court in reviewing the board's decisions. In addition, the Board expressly referred to the spirit and intent of the ordinances in establishing single-family

residential districts. The Board tried to maintain the R-1 district in accord with its perception of the original intent of the ordinance. I conclude that, as a matter of law, the board's decision was not arbitrary and capricious. Therefore, Door County's motion for summary judgment on the substantive due process claim will be granted.

AMENDMENT OF THE ORDINANCE

Harding's claim for injunctive and declaratory relief is based on an amendment to the Door County Zoning Ordinances passed by the County Board of Supervisors. Prior to May 1986, a "multiple occupancy development" was defined as:

> A building development on a lot wherein a building is or buildings are provided with living quarters in one or more occupancy units regardless of the characteristics of the user of the occupancy unit or units and regardless of the ownership of the building or

> buildings or the occupancy unit or units.

Effective May 4, 1986 the definition of multiple occupancy development was amended to add the following:

> Interval ownership projects, either newly constructed or converted from other uses or occupancies, in which the occupant resides for a continual period of 30 days or less are compatible with the uses allowed and the Recreational (REC), Shoreland Community (SC-1), Rural Community (RC-1), General Community (C-1), and Resort Commercial (C-2) Zoning Districts are hereby defined to be multiple occupancy developments and shall be designed and approved under section V.M.

Harding moves for summary judgment declaring this amendment unconstitutional and enjoining its enforcement by the Board. He argues that the amended ordinance deprives him of the equal protection of the laws because the amendment affects, only his development of all those within the county. He also argues that the amendment was passed at least in part 'because of' rather than

'in spite of' his proposed development. He does not contest Door County's right to regulate land use or timesharing developments, but argues that any such regulation must be applied equally to all residents of the of the county.

Door County presents two arguments in support of its motion on this claim. First, the county contends that this court should abstain from exercising its jurisdiction because this dispute involves zoning, a particularly local concern. Second, the county contends that Harding has failed to present to this court an Article 3 actual controversy cognizable under the Declaratory Judgment Act. This is due to his failure to apply for a zoning permit, variance, or rezoning under the amended ordinance.

It is undisputed that under the amended ordinance Harding's proposed

timesharing development is no longer possible in a residential (R-1) zoning district. However, under the ordinances Harding could apply for a zoning variance, rezoning of the property to one of those districts which allows for multiple occupancy developments, or a special exception. Because of this the county contends that Harding's constitutional claim may become moot should the County Board grant Harding a variance or rezoning of the property and thus remove the specter of a constitutional infringement. The county also highlights the fact that Harding does not allege a decrease in the value of his property or that the amendment to the ordinance prevents all profitable use of his land.

The county relies on Ad+Soil Services, Inc. v. Board of County Commissioners of Queen Ann's, 596 F.

Supp. 1139 (Dist. Md. 1984) to support its proposition that this court should abstain on the basis of Railroad Commission of Texas v. Pullman Company, 312 U.S. 496 (1941) and Burford v. Sun Oil Company, 319 U.S. 315 (1943). In Ad+Soil, the court abstained on the basis of the Pullman doctrine because the plaintiffs had failed to even apply for a conditional use permit. The court also found abstention proper under the Burford doctrine because the dispute involved an amendment to a zoning ordinance prior to the state court having an opportunity to review those amendments and zoning is a matter "entirely within the realm of the state and local governments... and there are few local issues more sensitive." 596 F. Supp. at 1142.

"The purpose of Burford abstention is to prevent a federal court from

interfering with a 'complex state regulatory scheme concerning important matters of state policy for which impartial and fair administrative determination subject to expeditious and adequate judicial review are afforded." Meredith v. Talbot County, Maryland, 828 F.2d 228, 231 (4th Cir. 1987) quoting Browning-Ferris, Inc. v. Baltimore County, Maryland, 744 F.2d 77 (4th Cir. 1985). "Pullman abstention, however, is appropriate where there are unsettled questions of state law that may dispose of the case and avoid the need for deciding the constitutional question." Id.

This case involves a zoning amendment which purports to regulate and limit timesharing developments such as the one Harding proposed. Other uses for the land are available to Harding and other options short of challenging

the constitutionality of the statute are also available. The Door County ordinances establish complex regulations governing land use and those ordinances and the Wisconsin statutes allow for adequate judicial review in the state court system. Under the principles of federalism this is a matter which the federal court should not intrude upon. Therefore I find that abstention under Burford is appropriate.

Abstention under Pullman is not quite is clear. Sautebin, the Zoning Administrator, testified at his deposition that the amendment as it exists in the ordinance prohibits the development as originally proposed by Harding. As noted in the above discussion, the zoning administrator has very little discretion in granting or denying a zoning permit, and only slightly more in granting a variance.

However, Harding may proceed to the Board for review of the administrator's decision, and may also petition the state circuit court for review of the Board's decision. Harding may be successful at either of these latter two stages which would negate the necessity to resolve the federal constitutional matter. In addition, Harding may be able to raise a constitutional or statutory challenge to the ordinance in circuit court. Such a course would promote the principles of federalism upon which the abstention doctrine is based. Therefore, I find abstention under Pullman to also be proper.

The general rule is to retain jurisdiction in Pullman situations but to dismiss in Burford situations. Meredith, 828 F.2d at 232. When abstention is proper under both grounds, it is recommended that district courts

dismiss the action. 17 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 4245. In this case I believe the proper course of action is to dismiss the action and allow Harding to pursue his rights and remedies under the Door County ordinances and Wisconsin Statutes.

FEES AND COSTS

Defendants have also requested their actual cost and attorney's fees incurred in defending this action pursuant to 42 U.S.C. 1988. That statute provides in pertinent part:

> In any action or proceeding to enforce a provision of [the civil rights acts] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

District courts do not abuse their discretion in ordering that each party bear its own costs where each of the parties succeeded on a portion of their

claim. Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279 (8th Cir. 1980) cert. denied 449 U.S. 1042.

In this particular case I find no justification for awarding defendants their costs and fees associated with this case. I have elected to abstain from hearing Harding's equal protection claim rather than deciding it on the merits. In addition, Harding stated some valid claims, such as for punitive damages against the original parties to this action. Once those parties were dismissed, he dropped those claims and proceeded only with those claims which he felt were viable. Under these circumstances, I believe it is proper for each party to bear its own costs in maintaining this action.

Accordingly,

IT IS ORDERED that plaintiff John T. Harding's motion for partial summary judgment be and same hereby is DENIED, and defendant County of Door's motion for summary judgment and to dismiss be and the same is hereby GRANTED.

Dated at Milwaukee, Wisconsin this 1st day of July, 1988.

BY THE COURT:

J. P. Stadtmueller
U.S. District Judge